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Helerry ak Bungkok v Public Prosecutor

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HIGH COURT (SIBU) — CRIMINAL APPEAL NO SBW-42S-15/11 OF 2018
LIM HOCK LENG JC
20 MARCH 2019

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Criminal Procedure — Appeal — Appeal against sentence — Appellant charged at sessions court under s 377CA of the Penal Code and s 14(d) of the Sexual Offenses Against Children Act 2017 — Appellant pleaded guilty and sentenced to total of 40 years of imprisonment and 13 strokes of rotan — Whether all terms of imprisonment should be served consecutively or concurrently, or varied — Penal Code s 377CA — Sexual Offenses Against Children Act 2017 s 14(d) — Criminal Procedure Code ss 305 & 323

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In Case No KPT-62JS-4/9 of 2018, the appellant had pleaded guilty to a charge under s 377CA of the Penal Code. He was sentenced to ten years imprisonment and ordered to be whipped three times by the Sessions Court in Kapit. The appellant also pleaded guilty to the three charges in KPT-62JS-2/4 of 2018. The first and second charges were in relation to offences under s 14(d) of the Sexual Offences Against Children Act 2017 ('the Act'), whereas the third charge was in relation to an offence under s 377CA of the Penal Code. The sentence that had been meted out to him in the other case was ordered to take effect after the completion of the ten consecutive sentences of imprisonment handed down in relation to three charges. For the first charge, the appellant was sentenced to a term of imprisonment for eight years and three strokes of the *rotan*. For the second charge, the appellant was sentenced to a term of imprisonment for ten years with three strokes of the *rotan*, and for the third charge, the appellant was sentenced to a term of imprisonment for 12 years with four strokes of the *rotan*. For all four charges, the appellant was sentenced to a total of 40 years and he would be whipped 13 times. As the appellant had pleaded guilty to all four charges, his appeal was confined to the sentencing meted out. The appellant asked the court to exercise its revisionary powers. The issue for consideration was whether all the terms of imprisonment should be consecutively served as ordered by the sessions court or concurrently served, or varied.

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Held, allowing the appeal and varying the sentences:

(1) A perusal of the notes of proceedings showed that the charge was 'read and explained to the accused in Iban' who then said he understood the charge and pleaded guilty. The three charges were individually read out

and thus the argument raised was of no merit. The wording of the charges showed that the appellant knew the punishment was set out in s 377CA of the Penal Code and s 14(d) of the Act. The amendments of the brief facts that were in the form of deletions were in favour of the appellant and there was no prejudice or 'serious flaw' as described by his counsel which would warrant a revision of the conviction. Thus, the application for revision in respect of the convictions was dismissed (see paras 11, 14–16, 20 & 21).

(2) The court considered the one transaction rule and the totality principle. The sentences passed by the sessions court were varied so that the appellant served a uniform ten years in prison for each of the charges. However, in respect of the two charges under s 14(d) of the Act and the two charges under s 377CA of the Penal Code, the sentences of ten years each were to run concurrently, bearing in mind that the same offence with the same actions was committed on the same victim within a short span of time. The concurrent imprisonment sentences under the Penal Code were to be served after the concurrent imprisonment sentences under the Act had been served. The cumulative effect was that the appellant would serve ten years in prison under the Penal Code charges, and thereafter serve another ten years, under the Sexual Offences Against Children Act 2017 charges. The whipping ordered was reduced to two strokes for each of the four charges, ie, the appellant would be caned eight times instead of 13 times (see paras 23–28).

(3) In reducing the total period of imprisonment and whipping, the guilty pleas by the appellant had been considered. At the same time, public interest and abhorrence at the nature of the offences had to be taken into account. While the offences perpetrated by the appellant on a ten-year-old girl may be said to be heinous, the four consecutive sentences for two types of offences at two different locations would be wrong and excessive in principle (see paras 29–31).

[Bahasa Malaysia summary

Dalam Kes Nombor KPT-62JS-4/9 Tahun 2018, perayu telah mengaku bersalah atas pertuduhan di bawah s 377CA Kanun Keseksaan. Dia dijatuhkan hukuman penjara sepuluh tahun dan diperintahkan untuk disebat tiga kali oleh Mahkamah Sesyen di Kapit. Perayu juga mengaku bersalah atas tiga pertuduhan di KPT-62JS-2/4 Tahun 2018. Pertuduhan pertama dan kedua berhubung dengan kesalahan di bawah s 14(d) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 ('Akta'), manakala pertuduhan ketiga adalah berkaitan dengan kesalahan di bawah s 377CA Kanun Keseksaan. Hukuman yang telah diputuskan kepadanya dalam kes lain telah diperintahkan untuk berkuatkuasa setelah selesai hukuman penjara sepuluh berturut-turut yang diturunkan berkaitan dengan tiga pertuduhan. Untuk pertuduhan pertama, perayu dihukum penjara selama lapan tahun dan tiga

sebatan rotan. Bagi pertuduhan kedua, perayu dijatuhi hukuman penjara selama sepuluh tahun dengan tiga sebatan rotan, dan untuk pertuduhan ketiga, perayu dijatuhi hukuman penjara selama 12 tahun dengan empat sebatan rotan. Bagi kesemua empat tuduhan, perayu dihukum selama 40 tahun dan dia akan disebat 13 kali. Oleh kerana perayu telah mengaku bersalah terhadap empat pertuduhan, rayuannya terhad kepada hukuman yang dikenakan. Perayu meminta mahkamah untuk menjalankan kuasa semakannya. Isu untuk pertimbangan adalah sama ada tempoh masa hukuman penjara harus dijalankan secara berturut-turut seperti yang diperintahkan oleh mahkamah sesyen atau dijalankan secara serentak, atau diubah.

Diputuskan, membernarkan rayuan dan mengubah hukuman:

(1) Penelitian nota prosiding menunjukkan bahawa pertuduhan telah 'dibaca dan dijelaskan kepada tertuduh dalam Iban' yang kemudian mengatakan dia memahami pertuduhan tersebut dan mengaku bersalah. Tiga tuduhan tersebut dibacakan secara berasingan dan oleh itu hujahan yang dibangkitkan tidak bermerit. Kata-kata pertuduhan menunjukkan bahawa perayu mengetahui bahawa hukuman dinyatakan dalam s 377CA Kanun Keseksaan dan s 14(d) Akta. Pindaan fakta ringkas yang dalam bentuk pemotongan berpihak kepada perayu dan tiada prejudis atau 'kecacatan serius' seperti yang dikatakan oleh peguamnya yang akan menjamin semakan semula sabitan tersebut. Oleh itu, permohonan untuk semakan berkenaan dengan sabitan telah ditolak (lihat perenggan 11, 14–16, 20 & 21).

(2) Mahkamah mempertimbangkan peraturan satu transaksi dan prinsip kesetaraan. Hukuman yang diberikan oleh mahkamah sesyen diubah supaya perayu tetap menjalankan sepuluh tahun penjara untuk setiap tuduhan. Walau bagaimanapun, berkenaan dengan dua tuduhan di bawah s 14(d) Akta dan dua tuduhan di bawah s 377CA Kanun Keseksaan, hukuman sepuluh tahun masing-masing untuk dijalankan secara serentak, dengan mengambil kira bahawa kesalahan yang sama dengan yang sama tindakan telah dilakukan terhadap mangsa yang sama dalam masa yang singkat. Hukuman penjara serentak di bawah Kanun Keseksaan hendaklah dijalankan selepas hukuman penjara serentak di bawah Akta telah dijalankan. Keseluruhan kesan adalah bahawa perayu akan menjalani sepuluh tahun penjara di bawah pertuduhan Kanun Keseksaan, dan seterusnya menjalani sepuluh tahun lagi, di bawah Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017. Sebatan yang diarahkan dikurangkan kepada dua sebatan untuk setiap empat pertuduhan, iaitu, perayu akan disebat sebanyak lapan kali bukannya 13 kali (lihat perenggan 23–28).

(3) Dalam mengurangkan jumlah tempoh penjara dan sebatan, pengakuan salah oleh perayu telah dipertimbangkan. Pada masa yang sama,

kepentingan awam dan penghinaan terhadap sifat kesalahan perlu diambil kira. Walaupun kesalahan yang dilakukan oleh perayu terhadap seorang gadis berusia sepuluh tahun boleh dikatakan kejam, empat hukuman berturut-turut untuk dua jenis kesalahan di dua lokasi berbeza adalah salah dan berlebihan pada prinsipnya (lihat perenggan 29–31).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 506–575.

Cases referred to

Ang Poh Chuan v PP [1996] 1 SLR 326, HC (refd)
Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534; [2004] 2 CLJ 572, CA (refd)
Kanagasuntharam v PP [1992] 1 SLR 81, CA (refd)
Manokaran & Anor v PP [1979] 1 MLJ 262 (refd)
Mohamad Izzaini bin Zainudin v PP [2019] 7 MLJ 366; [2018] 1 LNS 1351, HC (refd)

Legislation referred to

Criminal Procedure Code ss 305, 323
Penal Code s 377CA
Sexual Offences Against Children Act 2017 s 14(d)

Musa Dinggat (Musa Dinggat) for the appellant.
Muhammad Tajul Aariffin bin Musa (Attorney General's Chambers) for the respondent.

Lim Hock Leng JC:

KPT-62JS-4/9 OF 2018

[1] In Case No KPT-62JS-4/9 of 2018, the appellant had pleaded guilty on 27 September 2018 to a charge under s 377CA of the Penal Code.

[2] The charge was worded in the following manner:

> That you, between 30th August 2018 at about 11.00 PM to 31 August 2018, at about 1:30 AM at the farm house near Simpang Yong, 96800 in the district of Kapit, in the State of Sarawak, had sexual connection by object with X (NRIC : 081128-13-0822) by the introduction of your finger into the vagina of the said X without her consent. Thereby you have committed an offence punishable under Section 377CA of the Penal Code.

[3] He was sentenced to ten years imprisonment and ordered to be whipped three times by the Sessions Court in Kapit.

KPT-62JS-2/4 OF 2018

[4] The appellant also pleaded guilty to the three charges in KPT-62JS-2/4 of 2018. The sentence that had been meted out to him in the other case was ordered to take effect after the completion of the consecutive sentences of imprisonment handed down in relation to three charges. On a related note, although the NOP show that the three charges were read out and the pleas taken the next day, it is clear from a check on the court management system that they were taken in the afternoon of 27 September 2018.

[5] These three charges are reproduced as follows:

First Charge

> That you, between 30th August 2018 at about 11.00 PM to 31 August 2018, at about 1:30 AM behind the iron container at Sunny Hill housing estate at Jalan Selirik, 96800, in the district of Kapit, in the state of Sarawak had physically sexually assaulted a child by the name of X (NRIC: 081128-13-0822) to wit, by touching your penis to her vagina, licking her vagina, squeezing and sucking her breast but without having sexual intercourse with her. Thereby you have committed an offence punishable under Section 14(d) of the Sexual Offenses Against Children Act 2017.

Second Charge

> That you, between 30th August 2018 at about 11.00 PM to 31 August 2018, at about 1:30 AM at the farm house near Simpang Yong, 96800 in the district of Kapit, in the state of Sarawak had physically sexually assaulted a child by the name of X (NRIC: 081128-13-0822) to wit, by touching your penis to her vagina, licking her vagina, squeezing and sucking her breast but without having sexual intercourse with her. Thereby you have committed an offence punishable under Section 14(d) of the Sexual Offenses Against Children Act 2017.

Third Charge

> That you, between 30th August 2018 at about 11.00 PM to 31 August 2018, at about 1:30 AM behind the iron container at Sunny Hill housing estate at Jalan Selirik, 96800, in the district of Kapit, in the State of Sarawak, had sexual connection by object with X (NRIC: 081128-13-0822) by the introduction of your finger into the vagina of the said X without her consent. Thereby you have committed an offence punishable Under Section 377CA of the Penal Code.

[6] For the first charge, the appellant was sentenced to a term of imprisonment for eight years and three strokes of the *rotan*. For the second charge, the appellant was sentenced to a term of imprisonment for ten years with three strokes of the rotan, and for the third charge, the appellant was

sentenced to a term of imprisonment for 12 years with four strokes of the *rotan*.

PUNISHMENT METED OUT

[7] For all four charges, that meant the appellant was sentenced to a total of 40 years and he would be whipped 13 times.

[8] As the appellant had pleaded guilty to all four charges, his appeal would be confined to the sentencing meted out (s 305 of the Criminal Procedure Code).

REVISION

[9] To overcome that obstacle and to challenge the conviction (apart from the sentences), the appellant asked this court to exercise its revisionary powers pursuant to s 323 of the Criminal Procedure Code. See *Manokaran & Anor v Public Prosecutor* [1979] 1 MLJ 262.

[10] The application for revision of the conviction and sentence relating to the solitary charge in SBW-42S-14/11 of 2018, and the application for revision of the convictions and sentences relating to the three charges in SBW-42S-15/11 of 2018 were heard together.

[11] The appellant claimed that 'the charges were not read and explained separately to (him)' (NOP, 26 February 2019). It is a claim that does not apply to the first charge as a perusal of the notes of proceedings shows that the charge was 'read and explained to the accused in Iban' who then said he understood the charge and pleaded guilty.

[12] The transcript further shows:

Court	Do you understand the nature and consequences of pleading guilty?
Accused	Yes, I understand that.
Court	Do you know that by pleading guilty, you will be convicted of an offence under Section 377CA of Penal Code?
Accused	Yes, I understand that.
Court	Do you know that since you have pleaded guilty, there will be no trial and the prosecution will not be calling any witnesses to prove the offence against you?
Accused	Yes, I understand that.
Court	Do you know that since you have pleaded guilty, the court may proceed to punish you based on your plea according to the

	punishment provided for under Section 377CA of Penal Code which has just been read to you?	A
Accused	Yes, I understand that.	
Court	Do you know that since you plead guilty, if you wish to appeal subsequently you can only appeal against the sentence but not the conviction?	B
Accused	Yes, I know.	
Court	Do you still want to plead guilty?	
Accused	Yes	C
Court	The court is satisfied that the Accused understands the nature and the consequence of his plea and intend to admit the offence alleged against him.	

D

[13] Learned counsel for the appellant then argued that the three charges subsequently preferred against the appellant were read out in one go. He argued it was not sufficient that the appellant acknowledged his understanding of the charges after they were read out, as he had pleaded guilty thereto, only after all three charges had been read out successively without a break. In essence, the argument was that the plea ought to have been taken after each and every charge had been read out. E

[14] However, the notes of proceedings show that, at the re-mention at 12.05pm, the three charges were individually read out and the appellant said he understood each of them and pleaded guilty to each of them. After that was done, the charges were again read out, this time in one go and the appellant confirmed that he understood the charges. The appellant, when asked 'do you understand the nature and consequences of pleading guilty?', replied 'yes, I understand that'. F G

[15] There is thus no merit to that argument raised by learned counsel for the appellant.

[16] As for the argument that the punishment was not explained to the appellant, the wording of the charges show that the appellant knew the punishment was set out in s 377CA of the Penal Code and s 14(d) of the Sexual Offences Against Children Act 2017. It is recorded that he had stated he understood the consequences of pleading guilty and that the court would proceed to punish him pursuant to those statutory provisions. H I

[17] Next, learned counsel for the appellant complained that the brief facts were amended and 'the amendment was not read to the Appellant and whether he admit to it or not. That is another serious flaw'.

[18] The notes of proceedings however tell a different story. The brief facts were amended and then read and explained to the appellant in Iban. On both occasions, he said 'I understand the brief facts and admit it (sic) as correct'.

[19] For completeness, the amendments were in the form of deletions as follows:

> Saspek telah membaringkan mangsa dan memasukkan kemaluannya ke dalam kemaluan mangsa tetapi tidak dapat masuk ~~sepenuhnya~~.
>
> Di tempat kejadian kedua juga, suspek memasukkan kemaluannya ke kemaluan mangsa tetapi tidak dapat masuk ~~sepenuhnya~~.

[20] If anything, the deletions were in favour of the appellant and there is no prejudice or 'serious flaw' as described by his counsel which would warrant a revision of the conviction.

[21] In the upshot, the application for revision in respect of the convictions was dismissed.

REVISION/APPEAL ON SENTENCES

[22] That leaves the question whether all the terms of imprisonment should be consecutively served (as ordered by the sessions court) or concurrently served, or varied. The question will be dealt with by way of the appeal on points of law, considering the salient facts, including the nature of the offences, the age of the victim, the fact that the appellant pleaded guilty and public interest. As was held by the High Court in Singapore in *Ang Poh Chuan v Public Prosecutor* [1996] 1 SLR 326:

> revision ought not to be granted where there was a mere difference in the view of the law, as that lay in the province of the appellate process.

[23] In such instances, the court will consider the one transaction rule and the totality principle. In *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534 at p 539; [2004] 2 CLJ 572 at p 579, although the Court of Appeal held that '(p)ursuant to the one transaction rule where two or more offences are committed in the course of a single transaction all sentences in respect of these offences should be concurrent rather than consecutive', the rule is not absolute, citing with approval the following passage of Yong Pung How CJ in *Kanagasuntharam v Public Prosecutor* [1992] 1 SLR 81 at p 83:

> The English courts have recognised that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: see *R v Faulkner* [1972] 56 Cr App R 594, *R v Wheatley* [1983] 5 Cr App R (S) 417 and *R v Skinner* (1986) 8 Cr App R (S) 166. The applicability of the exception is said to depend on the facts of the case and the circumstances of the offence. It is

stated in broad and general terms and although it may be criticised as vague, it is necessarily in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard.

[24] The sentences passed by the sessions court are varied so that the appellant serves a uniform ten years in prison for each of the charges.

[25] (a) However, in respect of the two charges under s 14(d) of the Sexual Offences Against Children Act 2017, the sentences of ten years each are to run concurrently, bearing in mind that the same offence with the same actions was committed on the same victim within a short span of time.

(b) In respect of the two charges under s 377CA of the Penal Code, the sentences of ten years each are also to run concurrently, bearing in mind that the same offence with the same actions was also committed on the same victim within a short span of time.

[26] The concurrent imprisonment sentences under the Penal Code are to be served after the concurrent imprisonment sentences under the Sexual Offences Against Children Act 2017 have been served.

[27] The cumulative effect is that the appellant will serve ten years in prison under the Penal Code charges, and thereafter serve another ten years, under the Sexual Offences Against Children Act 2017 charges.

[28] The whipping ordered is reduced to two strokes for each of the four charges, that is, the appellant will be caned eight times instead of 13 times.

[29] In reducing the total period of imprisonment and whipping, the guilty pleas by the appellant have been considered.

[30] At the same time, public interest and abhorrence at the nature of the offences, as expressed by the recent Sexual Offences Against Children Act 2017 and the amendment brought out by s 377CA of the Penal Code, has to be taken into account. See *Mohamad Izzaini bin Zainudin v Public Prosecutor* [2019] 7 MLJ 366; [2018] 1 LNS 1351 where it was held:

> [26] In considering whether the sentence imposed on the Appellants was manifestly excessive or otherwise, this Court is mindful that public interest must always be the first and foremost consideration as emphasised by the Federal Court in the case of *Iwan Bujang Dara & Anor v Public Prosecutor* [2017] 3 MLJ 630; [2017] 1 LNS 285 (FC) as follows:
>
> > But the court is not only concerned with the plea in mitigation in passing sentence. No matter how strong the plea in mitigation is in favour of a lenient

A sentence, the court's overriding consideration has always been and will always be the public interest.

[31] While the offences perpetrated by the appellant on a ten-year-old girl may be said to be heinous, the four consecutive sentences for two types of offences at two different locations would be wrong and excessive in principle.

[32] The appellant would otherwise be incarcerated for 40 years and whipped 13 times.

[33] The appeals are allowed, and the sentences are varied to the extent as set out in paras 25–28 above.

Appeal allowed and sentences varied.

Reported by Nabilah Syahida Abdullah Salleh